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**IN THE
COURT OF APPEALS OF INDIANA**

SHICOTTA COAN,)	
Appellant-Petitioner,)	
and)	
RAMONA WARD,)	
Appellant-Intervenor,)	
)	
vs.)	No. 49A04-0602-CV-56
)	
JEREMY BORITZKI,)	
Appellee-Respondent.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Victoria M. Ransberger, Judge Pro Tempore
Cause No. 49D05-0004-DR-525

September 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Shicotta Coan (“Mother”) and Intervenor Ramona Ward (“Grandmother”) appeal an order transferring the physical and legal custody of C.B. to Appellee-Respondent Jeremy Boritzki (“Father”). Mother also challenges the child support order. We affirm in part, reverse in part, and remand for further proceedings.

Issues

Mother presents three issues for review:

- I. Whether the trial court abused its discretion by removing C.B. from her custody;
- II. Whether the trial court erred in determining that Father had no child support arrearage; and
- III. Whether the trial court abused its discretion by ordering Mother to pay \$15.00 weekly as child support.

Grandmother presents additional issues for review:

- IV. Whether the trial court abused its discretion by failing to award custody of C.B. to her, as recommended by the Guardian Ad Litem (“GAL”); and
- V. Whether Magistrate Victoria Ransberger lacked authority to enter the appealed order.

Facts and Procedural History

Mother and Father’s marriage was dissolved on April 13, 1999 and Mother was awarded custody of their child C.B., born August 29, 1996. On August 22, 2003, Father petitioned for a change of custody.

Before a hearing was scheduled on the custody petition, it was discovered that the sons of Father's then-girlfriend had sexually molested C.B.¹ On February 23, 2004, the trial court ordered that Father have supervised parenting time. The court also ordered that C.B. be taken to Midtown Mental Health Center for counseling. The parents were ordered to complete psychological evaluations and conflict resolution classes.

On January 26, 2005, the trial court entered an order providing that a representative of Indiana Advocates for Children, Kids Voice, would act as a guardian ad litem for C.B. On April 22, 2005, Grandmother filed her petition to intervene, seeking the physical custody of C.B. On April 25, 2005, after Father had completed conflict resolution classes and obtained counseling for non-offending parents, the trial court granted Father unsupervised parenting time. The trial court ordered that Mother take C.B. to psychological counseling sessions with Daniel Navarro, M.S.W. ("Navarro"). The trial court granted Grandmother's petition to intervene, and ordered a custody evaluation by the Domestic Relations Counseling Bureau ("DRCB").

On December 12, 2005 and on January 9, 10, and 11 of 2006, the trial court conducted hearings on the issues of custody modification and child support. The GAL recommended that custody be transferred to Grandmother. The DRCB recommended that custody be transferred to Father. At the conclusion of the final hearing, the trial court transferred custody of C.B. to Father. On January 13, 2006, the trial court entered its written order

¹ It is uncontroverted that Father then moved out of the girlfriend's residence and ceased contact with her or with her children.

modifying custody, ordering Mother to pay child support of \$15.00 weekly, and finding Father's child support arrearage to be zero. This appeal ensued.

Discussion and Decision

I. Modification of Custody

Indiana Code Section 31-17-2-21 governs the modification of a child custody decree, and provides in pertinent part:

- (a) The court may not modify a child custody order unless:
 - (1) the modification is in the best interests of the child; and
 - (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 8 and, if applicable, section 8.5 of this chapter.

Indiana Code Section 31-17-2-8 provides that the factors relevant to a custody order are as follows:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parent or parents;
 - (B) the child's sibling; and
 - (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:
 - (A) home;
 - (B) school; and
 - (C) community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Mother contends that the trial court erred in modifying C.B.'s custody because there is insufficient evidence of a substantial change in any of the statutory factors. More specifically, she argues that the trial court improperly focused upon her irrelevant social relationships rather than pertinent statutory factors.

We review custody modifications for an abuse of discretion and have a “preference for granting latitude and deference to our trial judges in family law matters.” Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). We do not substitute our own judgment for that of the trial court, even where the evidence might support a different conclusion but will set aside a custody modification judgment only when it is clearly erroneous, that is, if it lacks evidence or legitimate inferences to support it. Id.

In explaining its reasons for the custody modification, the trial court focused upon C.B.'s mental health, his education, and his interrelationship with his parents. The trial court found that Mother had refused to take C.B. for court-ordered therapy, and had interfered with Father's attempts to do so. The finding has evidentiary support. Navarro, who had been C.B.'s therapist for seven sessions, testified that C.B., as a molestation victim, needed substantial counseling to prevent his re-victimization or the risk that he would molest other children. Nevertheless, Mother not only failed to continue C.B.'s sessions, but also contacted Navarro to discourage him from conducting further sessions with Father. Father testified that when Mother learned he had scheduled a counseling appointment for C.B. with Navarro, Mother changed the parenting time schedule so that such appointments could not be scheduled. Additionally, Mother refused to sign, as custodial parent, Father's application for health insurance benefits for C.B.

The trial court also found that Mother was unable to successfully work with service providers and school officials on behalf of C.B. Here, too, the record supports this finding. Mother walked out of her first conflict resolution class, claiming that she had been called a liar and that she would not return. Mother abruptly withdrew C.B. from school after the principal did not respond appropriately, in Mother's view, to another child's threat against C.B. Mother ostensibly home schooled C.B., but did not present any evidence that an appropriate educational program was developed. Mother left town for several weeks, during which time Grandmother tutored C.B. intensively so that he could be admitted to public school for the next school year. However, C.B.'s academic and citizenship grades after re-enrollment were very poor.

The trial court's finding that Mother had systematically attempted to alienate C.B. from Father also has ample evidentiary support. Father and Grandmother testified that Mother denied Father parenting time and telephone visitation. Mother admitted that she, acting upon her own assessment of the circumstances rather than court order, denied Father parenting time on some occasions.

Finally, the trial court addressed Mother's habitual relationships with younger men, and characterized her lifestyle as unstable. Arguably, making references to the age of Mother's romantic partners is irrelevant to custody modification, absent evidence that the men interacted negatively with C.B. Nevertheless, there are other circumstances found by the trial court to suggest instability in Mother's lifestyle. Mother is chronically unemployed. She last worked at a part-time job several years before the custody hearing. She has been financially dependent upon her father for much of her thirty-nine years. As of the custody

hearing, she had moved out of her father's home and into subsidized housing. She receives food stamps, but is ineligible for Temporary Assistance to Needy Families on behalf of C.B.'s three-year-old half-sibling because she chooses not to cooperate in filing a paternity petition against the child's twenty-one-year-old putative father. At least one of Mother's romantic partners had battered her. She responded by going away for several weeks and leaving C.B. in Grandmother's care.

Mother contends that she merely made an isolated mistake in failing to continue C.B. in therapy with Navarro. We are mindful that, generally, a lack of cooperation or isolated acts of misconduct by a custodial parent cannot serve as a basis for the modification of child custody. Williamson v. Williamson, 825 N.E.2d 33, 42 (Ind. Ct. App. 2005). Here, however, it is apparent that C.B.'s needs for therapy, education, and a continuous relationship with both parents were not being met while he was in Mother's physical custody. As such, the trial court's modification of C.B.'s custody is not clearly erroneous.

II. Child Support Arrearage

With regard to Father's child support arrearage alleged to be in excess of \$10,000.00,² the trial court found as follows:

The Court having carefully reviewed Mother's summary submitted as Petitioner's Exhibit 2 and the attached certified Child Support Record finds the 2 documents inconsistent. The court relies on the certified child support history and finds that Father's arrearage is Zero (0.00).

² Mother contended that the arrearage was as much as \$10,128.29 based upon \$123.00 per week (consisting of the basic child support obligation and contribution to day care expenses). However, Mother agreed with Father that she had not incurred day care expenses for C.B. as contemplated in the parties' mediation wherein they agreed that the payment would increase from \$88.00 to \$123.00.

(App. 32.) Generally, decisions regarding child support are left to the sound discretion of the trial court, and we do not disturb the order absent an abuse of discretion or a determination that it is contrary to law. Thurman v. Thurman, 777 N.E.2d 41, 42 (Ind. Ct. App. 2002). An abuse of discretion is found where the trial court's decision is against the logic and effect of the facts and circumstances before the court. Id. at 43.

While his custody petition was pending, Father's child support arrearage accumulated such that the trial court, at the hearing on January 25, 2005, admonished him:

Dad, what I'm hearing from your counsel who is expected to be candid with the Court, as is Mr. Atz, is that you are not in compliance at all with child support. The fact is you're actually more than likely in contempt and you're bordering on a felony at this point. I mean, if you're at the level of arrearage based on the former order, you could be at a D-felony level. So I have some strong concerns about that.

(Tr. 65-66.) At the custody modification hearing, Father testified that he was in arrears on his child support.

Unfortunately, the certified payment history submitted into evidence by Mother is incomplete, as it includes only the years 2003, 2004 and 2005. Nevertheless, even the limited history shows some partial payments, and reflects no large lump sum payment to eliminate the accumulated arrearage existing at the beginning of 2005. Father submitted no evidence to contradict the certified payment history. As such, the finding of zero arrearage is against the logic and effect of the facts and circumstances before the trial court.

Because the trial court found zero arrearage, it made no determination on whether the child support should be modified retroactive to the filing of Father's petition, or whether Father should receive an abatement (as suggested at the modification hearing) for day care

contributions because no day care expenses were actually incurred as contemplated during mediation. Accordingly, we reverse the order with respect to the child support arrearage and remand for further proceedings consistent with this opinion.

III. Calculation of Mother's Child Support

Mother's final contention is that the trial court erred by ordering her to pay \$15.00 per week as child support. In particular, she argues that her imputed income should be only \$206 (the minimum wage of \$5.15 per hour times 40 hours) rather than \$230 imputed by the trial court, and that the \$206 should then be multiplied by .935, due to her subsequently born child.³ Father responds that the de minimis order of \$15.00 is not an abuse of discretion, and should not be reversed. We agree with Father. See e.g., Elkins v. Elkins, 763 N.E.2d 482, 487 (Ind. Ct. App. 2002) (finding de minimis mathematical error to be harmless and reversal not warranted).

IV. Denial of Custody to Grandmother

Grandmother argues that the trial court should have awarded the physical custody of C.B. to her as opposed to Father.

Before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. In re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002), reh'g denied. The presumption in favor of the natural parent will not be overcome merely

³ Consequently, Mother's share of the combined weekly adjusted income available to support C.B. would decrease from 31.5% as calculated by the trial court to 30%. Her basic child support obligation (before credit for parenting time) would be \$34.50 rather than \$37.81. However, the parenting time credit would be reduced to 23.35, providing for child support of \$11.15 weekly.

because a third party could provide better things for the child. Id. In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would be important, but the trial court is not limited to these criteria. Id. The issue is not merely the "fault" of the natural parent, but rather it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. Id. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review. Id.

Here, the court-appointed experts differed in their opinions of which party was ultimately best suited to have physical custody of C.B, who apparently expressed a desire to the GAL that he should be allowed to live with Grandmother. The fact-finder is not required to accept opinions of experts regarding custody, but may consider such evidence. Trost-Steffen v. Steffen, 772 N.E.2d 500, 510-11 (Ind. Ct. App. 2002), trans. denied. On appeal, Grandmother emphasizes the GAL report and the abundant evidence that she and her husband could provide a good home for C.B. Her argument is essentially a request that we reweigh the evidence, and credit the opinion of the GAL over that of the DCRB. However, we cannot merely substitute our judgment for that of the trial court. Id. at 509.

Grandmother did not overcome, by clear and convincing evidence, the presumption that C.B. should be in the custody of a natural parent. Accordingly, the trial court did not abuse its discretion by awarding Father rather than Grandmother physical custody of C.B.

V. Temporary Judge Appointment

Victoria Ransberger, Master Commissioner of Marion County Superior Court Five, presided over each of the hearings in this case. She signed the appealed order as Victoria Ransberger, temporary judge. The elected judge then approved the order. Grandmother correctly observes that, pursuant to Indiana Code Section 33-38-11-1, the appointment of a temporary judge must be in writing. She also correctly observes that the record in this case does not include such a written appointment.

Nevertheless, it is incumbent upon a party to object to a magistrate or commissioner presiding over the case. Indiana Code Section 33-33-49-32(c)-(d) provides:

A party to a superior court proceeding that has been assigned to a magistrate appointed under this section may request that an elected judge of the superior court preside over the proceeding instead of the magistrate to whom the proceeding has been assigned. A request under this subsection must be in writing and must be filed with the court:

- (1) in a civil case, not later than:
 - (A) ten (10) days after the pleadings are closed; or
 - (B) thirty (30) days after the case is entered on the chronological case summary, in a case in which the defendant is not required to answer; or
- (2) in a criminal case, not later than ten (10) days after the omnibus date.

Upon a timely request made under this subsection by either party, the magistrate to whom the proceeding has been assigned shall transfer the proceeding back to the superior court judge.

The predecessor of the foregoing statute, which was substantively similar, has been applied to commissioners. See Capehart v. Capehart, 771 N.E.2d 657, 662 (Ind. Ct. App. 2002). Grandmother did not request that the elected judge preside rather than his commissioner. Nor does she explain on appeal how she was prejudiced by the omission of a written appointment from the record.

Finally, we observe that Indiana Trial Rule 61 provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Grandmother has not demonstrated error that is inconsistent with substantial justice.

Conclusion

In light of the foregoing, the order modifying C.B.'s custody to Father is affirmed. The order that Mother pay \$15.00 weekly as child support is affirmed. However, we reverse the order providing that Father's child support arrearage is zero, and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

RILEY, J., and MAY, J., concur.